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8 CITY OF BELL, CITY OF BELL POLICE  
DEPARTMENT, ROBERT RIZZO, BRUCE  
9 D. PRAET, ANDY PROBST, MICHAEL  
CHAVEZ, ANTHONY MIRANDA, STEVE  
10 FINKELSTEIN, and SERGIO CAMACHO

11  
12 UNITED STATES DISTRICT COURT  
13 CENTRAL DISTRICT OF CALIFORNIA

14 ROBERT "LEO" MCSWEENEY,  
15 Plaintiff,

16 v.

17 CITY OF BELL, A Public Entity; CITY  
OF BELL POLICE DEPARTMENT, A  
18 Public Agency; ROBERT RIZZO, as  
City Manager, BRUCE D. PRAET, In  
19 his Capacity As the City Attorney;  
ANDY PROBST, Individually and as  
20 Chief of Police; MICHAEL CHAVEZ,  
Individually and as the Assistance Chief  
21 of Police; ANTHONY MIRANDA,  
Individually and as a Captain; STEVE  
22 FINKELSTEIN, Individually and as a  
Captain; SERGIO CAMACHO,  
23 Individually and as a Lieutenant; and  
DOES 1 through 100, inclusive,  
24 Defendants.

Case No. CV 08-7006-JFW (PLAx)

**DEFENDANTS' NOTICE OF  
MOTION AND MOTION:**

- (1) **TO DISMISS THE FIRST  
AMENDED COMPLAINT  
PURSUANT TO FED. R. CIV.  
P. 12(b)(6), OR  
ALTERNATIVELY**
- (2) **FOR A MORE DEFINITE  
STATEMENT PURSUANT TO  
FED. R. CIV. P. 12(e)**

Complaint Filed: October 23, 2008

Date: March 16, 2009  
Time: 1:30 p.m.

**TO THIS HONORABLE COURT, ALL PARTIES AND THEIR ATTORNEYS  
OF RECORD:**

PLEASE TAKE NOTICE that on March 16, 2009 at p.m., or as soon thereafter as the matter may be heard in the courtroom of the Honorable John F. Walter of the above-entitled court, located at 312 N. Spring Street, Los Angeles, California 90012, Defendants City of Bell, City of Bell Police Department, Robert Rizzo, Andy Probst, Michael Chavez, Anthony Miranda, Steve Finkelstein, and Sergio Camacho will and hereby do move the court as follows:

(1) for an order pursuant to Federal Rule of Civil Procedure 12(b)(6) dismissing Plaintiff's First Amended Complaint as against all Defendants for failure to state a claim upon which relief can be granted; or alternatively

(2) for an order pursuant to Federal Rule of Civil Procedure 12(e) requiring Plaintiff to provide a more definite statement of his claims.

This Motion is made on the grounds that the Plaintiff Robert "Leo" McSweeney ("Plaintiff") has not plead a claim for relief for violation of USERRA against Defendants. Alternatively, because Plaintiff has defied this Court's specific instructions and engaged in vague and undifferentiated group allegations rather than stating which Defendant did what, Defendants respectfully request that the Court order Plaintiff provide a more definite statement pursuant to Federal Rule of Civil Procedure 12(e).

Plaintiff's sole claim for relief in the First Amended Complaint (the "FAC"), for violation of USERRA, is defective as to each Defendant. It is defective as to Defendants Michael Chavez, Anthony Miranda, Steve Finkelstein, and Sergio Camacho because Plaintiff does not state facts showing that their employer, the City of Bell, delegated pertinent employment-related responsibilities to them. The FAC is defective as to the remaining Defendants because Plaintiff does not explain what each of them allegedly did. The Court previously ordered Plaintiff to allege specifically what each Defendant did, and to avoid group pleading allegations.

1 Plaintiff ignored and defied this specific order and repeated exactly the same  
 2 allegations he offered in his original Complaint. Plaintiff has done nothing to comply  
 3 with the Court's orders and, even after extensive meet and confer efforts, refuses to  
 4 amend his FAC to omit group pleading allegations and specifically allege what  
 5 actions each Defendant undertook to violate USERRA.

6 Therefore, if the Court does not dismiss the FAC in its entirety, or dismisses it  
 7 only with respect to some Defendants, the Court should order Plaintiff to produce a  
 8 more definite statement so that Defendants can reasonably prepare a response.

9 This Motion is based upon the attached Memorandum of Points and  
 10 Authorities, the files and records of this case, and upon such further argument as the  
 11 Court may permit at the hearing of the matter.

12 Defendants make this Motion following meet and confer efforts of counsel  
 13 pursuant to Local Rule 7-3 on November 21, November 26, December 12, and  
 14 December 22, 2008 and February 6, February 10, and February 11, 2009. During the  
 15 course of these meet and confer efforts, Plaintiff's counsel refused to dismiss the  
 16 FAC as against Defendants or comply with this Court's order that the FAC omit  
 17 group pleading allegations and instead clearly state each defendant's actions upon  
 18 which Plaintiff claims he is due relief.

19 DATED: February 17, 2009      Respectfully submitted,

20 BROWN, WHITE & NEWHOUSE LLP

21  
 22  
 23 By



THOMAS M. BROWN  
 NANNINA L. ANGIONI  
 SYDNEY M. MEHRINGER

24  
 25 Attorneys for Defendants  
 26 CITY OF BELL, CITY OF BELL POLICE  
 27 DEPARTMENT, ROBERT RIZZO, BRUCE  
 28 D. PRAET, ANDY PROBST, MICHAEL  
 CHAVEZ, ANTHONY MIRANDA, STEVE  
 FINKELSTEIN, and SERGIO CAMACHO

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 By this Motion, Defendants ask the Court to dismiss Plaintiff's First Amended  
5 Complaint (the "FAC"), which asserts one claim for relief for violation of the  
6 Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38  
7 U.S.C. § 4301 *et seq.*, for failure to state a claim upon which relief can be granted..  
8 The FAC fails to allege specifically what actions each Defendant undertook to violate  
9 USERRA. Moreover, with respect to Defendants Michael Chavez, Anthony  
10 Miranda, Steve Finkelstein, and Sergio Camacho, Plaintiff does not state facts  
11 establishing that they qualify as employers under USERRA, and thus does not state a  
12 claim against them. .

13 Alternatively, Defendants ask this Court to order a more definite statement as  
14 to the allegations supporting Plaintiff's USERRA claim for relief. At the January 12,  
15 2009 Status Conference, this Court expressly ordered Plaintiff to file an amended  
16 complaint that did not include group pleading allegations and that specifically alleged  
17 what each Defendant did to give rise to Plaintiff's claim for relief. Despite these  
18 clear instructions, and Defendants' extensive meet and confer efforts, Plaintiff  
19 repeats his vague and undifferentiated group pleading allegations nearly verbatim  
20 from his original Complaint, and has refused clarify the basis of each Defendant's  
21 alleged liability for violation of USERRA. The allegations supporting Plaintiff's  
22 FAC are so vague and ambiguous that Defendants cannot reasonably prepare a  
23 response. Thus, if the Court does not dismiss the FAC in its entirety, or only  
24 dismisses it as against some of the Defendants, the Court should also order a more  
25 definite statement as to Plaintiff's unintelligible claim. .

26 ///

27 ///

28 ///

1 II.

2 **PERTINENT ALLEGATIONS**

3 The FAC alleges as follows: Plaintiff is a former police officer for the City of  
 4 Bell ("City"). The City hired him in March 2004. FAC ¶ 29. In October 2004,  
 5 Plaintiff became a member of the Marine Corps reserves. *Id.* at ¶ 30. He was  
 6 summoned for active duty in June 2005 and left to serve in Iraq in September 2005.  
 7 *Id.* at ¶¶ 32 and 34. Plaintiff returned to his position with the City in June 2006. *Id.*  
 8 at ¶ 34 (sic).<sup>1</sup> Plaintiff alleges that when he returned to work, he was discriminated  
 9 against and subjected to numerous adverse working conditions including being  
 10 shunned and ignored during briefings and being treated like an entry-level employee.  
 11 *Id.* at ¶ 39 (sic). He also alleges that he witnessed improper conduct by a City  
 12 employee and that he was retaliated against for truthfully attesting to what he  
 13 witnessed. *Id.* at ¶¶ 48 (sic) and 53 (sic).

14 The City fired Plaintiff on August 28, 2006. *Id.* at ¶ 55 (sic). He alleges that  
 15 the City terminated him because of his disclosure of unlawful conduct and his  
 16 military service. *Id.* at ¶ 56 (sic). Plaintiff challenged his termination and ultimately  
 17 entered into a settlement agreement with the City during December 2006 (the  
 18 "Settlement Agreement"). As part of the Settlement Agreement, Plaintiff was placed  
 19 on paid administrative leave while he searched for another job. *Id.* at ¶ 58 (sic). In  
 20 the event he did not find alternative employment, the City agreed to reinstate  
 21 Plaintiff to his position as a police officer. *Ibid.*

22 Plaintiff did not find alternative employment and returned to work with the  
 23 City on August 20, 2008. *Id.* at ¶ 69 (sic). Plaintiff worked as a police officer for  
 24 approximately six weeks, during which time he alleges that he suffered harassment,  
 25  
 26

27 <sup>1</sup> Plaintiff misnumbers the paragraphs in the FAC. The first 37 paragraphs are properly  
 28 numbered. Thereafter, Plaintiff mistakenly numbers paragraph 38 as paragraph 32 and then  
 continues to improperly number each paragraph thereafter.

1 discrimination, retaliation and defamation. *Id.* at ¶ 70 (sic). Plaintiff resigned from  
2 his position as a City police officer on October 1, 2008. *Id.* at ¶ 78 (sic).

### 3 III.

#### 4 ARGUMENT

5 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the  
6 claims stated in the complaint. Plaintiffs must plead facts establishing their  
7 entitlement to relief. This obligation requires more than mere labels and conclusions,  
8 and more than a formulaic recitation of the elements of a claim for relief. *Bell*  
9 *Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007). The Court should dismiss a claim  
10 for relief where there is either a “lack of a cognizable legal theory” or “the absence of  
11 sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police*  
12 *Dept.*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1990).

13 A court should grant a motion for a more definite statement under Rule 12(e)  
14 where the complaint is so indefinite that the defendant cannot ascertain the nature of  
15 the claim being asserted. In such cases, the defendant cannot reasonably be expected  
16 to frame a proper response. *See Famolare, Inc. v. Edison Bros. Stores, Inc.*, 525  
17 F.Supp. 940, 949 (E.D. C.A. 1981); *Cellars v. Pacific Coast Packaging, Inc.* 189  
18 F.R.D 575, 578 (N.D. C.A. 1999). A motion for more definite statement attacks  
19 unintelligibility in a pleading, not simply mere lack of detail. Thus, the motion  
20 should be granted where the complaint is not specific enough to apprise a defendant  
21 of the substance of the claim being asserted. *Bureerong v. Uvawas*, 922 F.Supp.  
22 1450, 1461 (C.D. Cal. 1996).

23 A. **PLAINTIFF DOES NOT STATE A CLAIM FOR RELIEF FOR**  
24 **VIOLATION OF USERRA BECAUSE THE ALLEGATIONS FAIL TO**  
25 **SPECIFY WHAT EACH DEFENDANT DID TO VIOLATE USERRA**  
26 **AND BECAUSE PLAINTIFF DOES NOT ESTABLISH THAT**  
27 **DEFENDANTS MIRANDA, FINKELSTEIN, CAMACHO, AND**  
28 **CHAVEZ ARE EMPLOYERS AS DEFINED BY THE STATUTE**



1 Plaintiff has asserted his only claim for relief for violation of USERRA against  
 2 all named Defendants. However, Plaintiff has not alleged facts sufficient to state a  
 3 USERRA claim against any Defendant. The FAC is laden with group pleading  
 4 allegations, none of which specify what each separate Defendant allegedly did to  
 5 violate USERRA. For example, there is no allegation that Defendant Rizzo  
 6 personally undertook any actions that violated USERRA. Likewise, the FAC fails to  
 7 set forth any allegations that Defendants Probst, the City of Bell, the City of Bell  
 8 Police Department, Miranda, Finkelstein, Camacho, or Chavez personally did  
 9 anything in violation of USERRA.. Plaintiff cannot state a claim for relief against  
 10 Defendants without specifying what each Defendant is alleged to have done.  
 11 Defendants thus respectfully request that the Court dismiss Plaintiff's FAC.

12 Additionally, Plaintiff cannot maintain this claim against Defendants Miranda,  
 13 Finkelstein, Camacho and Chavez because he cannot establish that these defendants  
 14 qualify as employers under USERRA. USERRA only prohibits discrimination or  
 15 adverse employment actions *by an employer* such as the City. Plaintiff has not  
 16 alleged facts showing that Defendants Miranda, Finkelstein, Camacho, and Chavez  
 17 are "employers" under USERRA.

18 USERRA defines the term "employer" as follows:

19 "any person, institution, organization, or other entity that pays  
 20 salary or wages for work performed or that has control over  
 21 employment opportunities, including – a person, institution,  
 22 organization, or other entity to whom the employer has  
 23 delegated the performance of employment-related  
 responsibilities ..." 38 U.S.C. §4303(4)(A),

24 Plaintiff does not allege any facts about Defendants Miranda, Finkelstein,  
 25 Camacho and Chavez to indicate that these Defendants had control over Plaintiff's  
 26 employment opportunities or that they were persons to whom the City and the  
 27 Department delegated employment related-responsibilities. Therefore, Plaintiff has  
 28

1 failed to state facts showing that these Defendants were his “employers,” and has  
 2 failed to plead USERRA adequately against them.

3 As to Defendant Finkelstein, Plaintiff only alleges that Finkelstein interviewed  
 4 Plaintiff about the misconduct Plaintiff allegedly observed and that he interfered with  
 5 Plaintiff’s access to certain safety and employment gear. FAC at ¶¶ 52 (sic) and 73  
 6 (sic). Plaintiff alleges that Defendant Camacho warned Plaintiff after he returned  
 7 from military leave and allegedly made rude comments about Plaintiff. *Id.* at ¶¶ 38  
 8 and 71. Plaintiff alleges that Chavez was angry about Plaintiff’s military leave and  
 9 that he attended the meeting where Plaintiff was terminated. *Id.* at ¶¶ 33, 36, and 55.  
 10 Plaintiff’s allegations do not establish or support an inference that these individuals  
 11 were Plaintiff’s employers under USERRA or that they had any control over  
 12 Plaintiff’s employment opportunities. Thus, as a matter of law, Plaintiff has not  
 13 stated a USERRA claim against these Defendants.

14 Plaintiff’s allegations regarding Defendant Miranda are insufficient because  
 15 Plaintiff has not alleged that the City delegated the performance of employment-  
 16 related responsibilities, such as hiring and/or firing employees, to him. Plaintiff’s  
 17 allegations regarding Miranda relate to supervision of Plaintiff’s work schedule.  
 18 Specifically, Plaintiff alleges that Miranda ordered Plaintiff to work on the graveyard  
 19 shift. *Id.* at ¶ 75 (sic). Although this suggests Miranda had some limited control over  
 20 Plaintiff’s work schedule, it is insufficient to establish that Miranda had control over  
 21 hiring and firing, as required by USERRA. 38 U.S.C. §4303(4)(A)(i); *Satterfield v.*  
 22 *Borough of Schuylkill Haven*, 12 F.Supp.2d 423, 438 (E.D. Pa. 1998) (individual  
 23 defendants had no individual power over plaintiff, as plaintiff was hired, directly  
 24 supervised, and fired by town council); *Brandsasse v. City of Suffolk, Va.*, 72  
 25 F.Supp.2d 608, 618 (E.D. Va. 1999) (Director of Personnel liable under USERRA  
 26 because he had hiring and firing authority.)

27 Plaintiff alleges that the City hired Plaintiff and Defendant Probst fired him.  
 28 FAC at ¶¶ 29 and 55 (sic). Therefore Plaintiff’s allegation that Miranda ordered him



1 to remain on the graveyard shift is insufficient to hold Miranda individually liable  
 2 under USERRA, as Miranda's alleged ability to influence a work schedule is not the  
 3 equivalent of the power to hire or fire. Similarly, as set forth above, Plaintiff does  
 4 not offer any facts suggesting that Defendants Finkelstein, Camacho, and Chavez had  
 5 any control whatsoever over the Plaintiff, let alone the power to hire or fire  
 6 employees. Plaintiff has not stated a claim for relief under USERRA against  
 7 Defendants Miranda, Finkelstein, Camacho and Chavez. Defendants therefore  
 8 respectfully request that the Court dismiss this claim for relief as against those  
 9 Defendants or, alternatively, order Plaintiff to provide a more definite statement  
 10 alleging factual grounds upon which his claim can stand.

11 **B. THE ALLEGATIONS SUPPORTING PLAINTIFF'S ONLY CLAIM**  
 12 **FOR RELIEF FOR VIOLATION OF USERRA ARE SO VAGUE AND**  
 13 **AMBIGUOUS THAT DEFENDANTS CANNOT FRAME A**  
 14 **MEANINGFUL RESPONSE, AND THIS COURT SHOULD ORDER A**  
 15 **MORE DEFINITE STATEMENT**

16 To support his sole claim for relief, Plaintiff offers only group pleading  
 17 allegations treating all Defendants as an undifferentiated group. These allegations  
 18 are so vague and ambiguous that it is impossible to determine what each Defendant is  
 19 alleged to have done to violate USERRA, and impossible to determine whether each  
 20 Defendant's liability is alleged to be based on his or its own acts or on the acts of  
 21 another. Plaintiff merely pleads that "Defendants" constructively terminated  
 22 Plaintiff, failed to provide Plaintiff with employment benefits, deprived Plaintiff of  
 23 his rights, privileges, and immunities, harassed, and retaliated and discriminated  
 24 against Plaintiff. *Id.* at ¶¶ 93 (sic), 95 (sic), and 96 (sic).

25 These vague allegations do not attribute any specific acts or conduct to each  
 26 Defendant sufficient to state a claim for violation of USERRA against them. Even  
 27 when the general allegations are incorporated by reference into this claim,  
 28 Defendants have no way to determine what acts each of them allegedly undertook to

1 violate USERRA. Therefore Defendants cannot meaningfully respond to this claim  
2 for relief. Accordingly, Defendants respectfully request that the Court order Plaintiff  
3 to provide a more definite statement regarding his violation for USERRA claim for  
4 relief. Had Plaintiff simply followed this Court's explicit order to avoid group  
5 pleading allegations and state facts explaining what each Defendant did, this request  
6 would not have been necessary.

7  
8 **IV.**

9 **CONCLUSION**


10 Plaintiff's First Amended is hopelessly vague, unintelligible, and defective as a  
11 matter of law. Defendants respectfully request that the Court dismiss the First  
12 Amended Complaint because Plaintiff has not stated facts sufficient to support his  
13 claim against Defendants. Alternatively, Defendants respectfully request that the  
14 Court order Plaintiff to provide a more definite statement to cure the vague and  
15 ambiguous group allegations that prevent each Defendant from offering a meaningful  
16 response.

17 DATED: February 17, 2009

Respectfully submitted,

18 BROWN, WHITE & NEWHOUSE LLP

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20 By

  
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